

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22**

800 RIVER ROAD OPERATING
COMPANY, LLC, d/b/a WOODCREST
HEALTH CARE CENTER

and

1199 SEIU, UNITED HEALTHCARE
WORKERS EAST

CASE NO.: 22-CA-097938

**RESPONSE TO COUNSEL FOR THE GENERAL COUNSEL'S
MOTION FOR LEAVE TO AMEND COMPLAINT**

800 River Road Operating Company, LLC d/b/a Woodcrest Health Care Center ("Woodcrest"), by and through undersigned counsel, files its Response to the Counsel for the General Counsel's (the "CGC") Motion for Leave to Amend Complaint. This case involves Woodcrest's January 2013 decision to refuse to bargain with 1199 SEIU, United Healthcare Workers East (the "Union") because the Board incorrectly certified the Union as the bargaining representative of a unit of Woodcrest's employees.

On November 26, 2014, the Board issued a Decision, Certification of Representative, and Notice to Show Cause in the above captioned case wherein the Board noted that "[a]lthough [Woodcrest's] legal position may remain unchanged, it is possible that [Woodcrest] has or intends to commence bargaining or to provide information at this time" and granted the CGC "leave to amend the complaint on or before December 8, 2014, to conform with the current state of the evidence." 361 NLRB No. 117, slip op. at 2 (Nov. 26, 2014). Simply put, the CGC inexplicably ignored and failed to meet the December 8, 2014 deadline to amend the Complaint, and the CGC

now intends to rely on actions taken by the Union and Woodcrest subsequent to the deadline to attempt to amend the Complaint past the Board's deadline. In addition, even if the CGC had not ignored and failed to meet the deadline, Woodcrest's actions did not constitute an independent refusal to bargain that would warrant amending the Complaint. Thus, the Board should deny the CGC's motion.

A. Facts

Since on or about January 2013, Woodcrest has refused to bargain with the Union because the Board wrongly certified the Union for the reasons set forth in Woodcrest's Exceptions to the June 18, 2012 Report of the Hearing Officer. Woodcrest, in its March 27, 2013 letter to Gary Shinnars, Acting Executive Secretary of the Board, stated that it did not intend to challenge the CGC's motion for summary judgment as to whether Woodcrest refused to bargain with the Union since on or about January 2013, and Woodcrest stated its intention to have a United States Court of Appeals hear the issue of whether the Board properly certified the Union. Since then, there has been much legal wrangling over the Board's substantive decision, as well as the ability of the then two-member Board to issue those decisions.

On November 26, 2014, a three-member Board issued a Decision, Certification of Representative, and Notice to Show Cause (the "November 26 Decision"), wherein the Board reaffirmed its certification of the Union as the bargaining representative of the petitioned-for unit of Woodcrest's employees. 361 NLRB No. 117, slip op. at 1. The Board noted that since Woodcrest's initial refusal to bargain in January 2013, "[a]lthough [Woodcrest's] legal position may remain unchanged, it is possible that [Woodcrest] has or intends to commence bargaining or to provide information at this time." *Id.* Thus, the Board granted the CGC "leave to amend the

complaint on or before December 8, 2014, to conform with the current state of the evidence.” 361 NLRB No. 117, slip op. at 2.

The CGC did not amend the Complaint, nor did the CGC or Union take any other action, by December 8, 2014. However, on January 22, 2015, the Union’s counsel sent a letter to Woodcrest requesting to meet and bargain with Woodcrest over the terms and conditions of employment for the petitioned-for unit of Woodcrest’s employees and requesting certain information from Woodcrest. (See Exhibit A, January 22, 2015 letter from Katharine H. Hansen to Administrator, Woodcrest Health Care Center). On February 2, 2015, counsel for Woodcrest responded to the Union’s letter, informing the Union’s counsel that Woodcrest’s challenge to the Union’s certification was still before the Board and Woodcrest’s position regarding the certification remained unchanged. (See Exhibit B, February 2, 2015 letter from Frank Birchfield to Katherine H. Hansen).

Indeed, as of February 2, 2015 and to date, the Board has not ruled on the CGC’s motion for summary judgment. In addition, as the Board noted in the November 26 decision, restating Woodcrest’s position from its March 27, 2013 letter to the Board, Woodcrest has “refused to bargain for the purpose of testing the validity of the certification of representative in the U.S. Court of Appeals.” 361 NLRB No. 117, slip op. at 2. Of course, Woodcrest cannot file an appeal until the Board grants the CGC’s motion for summary judgment or otherwise makes a dispositive ruling on the substantive issues before it.

B. The Board Should Deny the CGC's Motion for Leave to Amend the Complaint Because the CGC Failed to Meet its December 8, 2014 Deadline

The November 26 decision set forth the process by which the parties were to proceed in this case and gave the CGC until December 8, 2014 to amend the Complaint to "conform [the Complaint] with the current state of the evidence." *Id.* The possible need for such an amended Complaint would be because, "[a]lthough [Woodcrest's] legal position may remain unchanged, it is possible that [Woodcrest] has or intends to commence bargaining or to provide information at this time." *Id.* Simply put, the Union and the CGC failed to meet the Board's deadline, and the actions of the Union in sending a letter requesting bargaining and the CGC seeking leave to amend the Complaint after December 8, 2014 contravened the Board's attempt to set forth an orderly process for resolving the substantive issues before it in this case.

The only change in Woodcrest's position since January 2013 would have been to bargain or provide information – information that the Union, as the charging party, would certainly have been aware of. If there were additional facts surrounding that bargaining that warranted an amended Complaint, the November 26 Decision gave the Union and the CGC 12 days to determine those facts and amend the Complaint. Instead, the Union did not attempt to determine whether Woodcrest's position had changed until it sent its January 22, 2015 letter to Woodcrest requesting bargaining, which was over one month past the Board's deadline. The Board set such a deadline because, carrying the Union and the CGC's actions to their logical conclusion, the Union could endlessly send requests to bargain to Woodcrest anticipating – accurately – that Woodcrest's legal position was that it would not engage in bargaining while its legal challenges were still pending (both before the Board and a future challenge before the Court of Appeals, as Woodcrest previously stated and the Board acknowledged). The CGC could then file endless

motions for leave to amend the Complaint with new allegations that simply amounted to Woodcrest reaffirming its legal position, forcing Woodcrest to respond to these endless motions over and over until a Court of Appeals decided the underlying issues.

Allowing the Union and CGC to constantly amend the Complaint to add refusal-to-bargain allegations while Woodcrest's legal challenges run their course is not in the Board's interest of expeditiously remedying any violations of the Act that Woodcrest is alleged to have committed or in the interest of any of the parties. Recognizing this, the Board gave the Union and the CGC a reasonable 12 day window to act, and the Union and CGC simply failed to do so.

C. Even if the CGC Could Amend the Complaint, Woodcrest's Actions Did Not Constitute a Refusal to Bargain Such That an Amended Complaint is Warranted

Woodcrest's February 2, 2015 letter, contrary to the CGC's contentions, was not a refusal to bargain that would warrant amending the Complaint. In the role of Woodcrest's legal advocate, counsel for Woodcrest advised the Union's counsel of Woodcrest's legal position in the pending litigation, observing that nothing had changed regarding Woodcrest's challenge to the Union's certification since Woodcrest initially declined to bargain with the Union in January 2013. The litigation over Woodcrest's challenge, as counsel for Woodcrest noted to the Union, is not complete. Until that challenge is complete, Woodcrest's legal obligations to the Union remain unchanged, and there can be no additional refusal to bargain.

The fact that Woodcrest declined to engage in bargaining with the Union after the Union's January 22, 2015 letter does not stem from any new factual developments or changes in the posture of the litigation; rather, it is a continuation of Woodcrest's original position on bargaining from January 2013. As such, Woodcrest's February 2, 2015 letter simply would not be

considered an independent violation of the Act even if Woodcrest's refusal to bargain is determined to be unlawful. *See Canton Sign Co.*, 186 NLRB 237, 238 (1970) (where the Board in a previous case had already determined that the employer violated 8(a)(5) of the Act and ordered the employer to bargain with the union, the Board declined to issue a new order when the employer still refused to bargain with the union because "no useful purpose would be served by issuing another bargaining order" since the employer "is still under an obligation...to cease and desist from refusing to recognize and bargain collectively with the Union....").¹

To accept the CGC's position would be to posit the ludicrous contention that counsel for an employer in a refusal-to-bargain case can never reaffirm its client's position to counsel for the union without incurring an additional and independent allegation of refusing to bargain. The General Counsel's office, itself, recognizes that the position the CGC takes here is illogical. In the National Labor Relations Board Casehandling Manual for Unfair Labor Practice Proceedings, the General Counsel's Office instructs the Regional Offices as follows:

When a new 8(a)(5) charge (herein an interim charge) is filed after the Regional Office has issued complaint seeking to compel the employer to recognize and bargain with the union, the following procedures should be followed:

(a) Charge Seeking Only Bargaining Order: An interim 8(a)(5) charge that simply alleges a continuation of the refusal to recognize and bargain with the union **does not warrant the issuance of a new complaint**. As the Board pointed out in *Canton Sign Co.*, 186 NLRB 237 (1970), no useful purpose can be served by an order based on such an interim charge where the employer is already subject to an order to bargain. Thus, enforcement of the bargaining order sought in an outstanding complaint will provide an early and

¹ Nor does the CGC amend the Complaint to seek a remedy other than an Order requiring Woodcrest to bargain in good faith with the Union, which would be the only reason to add allegations regarding a continuation of the refusal to bargain. *Clark United Corp.*, 319 NLRB 328, 329 n.2 (1995) (citing *Canton* and holding that the "Board generally declines to issue a second bargaining order where the first order is still extant and no useful purpose would be served by a second order [unless] the allegations involve unilateral changes which would support remedies that were not included in the prior proceeding....").

effective remedy for the violations alleged in the interim charges. Accordingly, the Regional Office should dismiss such charges.

See NLRB Casehandling Manual for Unfair Labor Practice Proceedings § 10026 (emphasis added). Similarly, here, the CGC, contrary to the General Counsel's Office's stated position, seeks to amend the Complaint to add allegations of a "continuation of the refusal to bargain" that "would serve no useful purpose."

The only rational conclusion from the November 26 Decision giving the Union and the CGC 12 days to determine if Woodcrest, despite its legal position, would be willing to bargain or exchange information with the Union is that if Woodcrest had decided to bargain with the Union at that time, the CGC should then amend the Complaint to conform with the fact that Woodcrest was no longer refusing to bargain as of December 8, 2014. It would be illogical to read the November 26 Decision to allow – and even encourage – the Union and the CGC to seek to add to a Complaint allegations that "would serve no useful purpose."

Thus, the Board should deny the CGC's Motion for Leave to Amend.

New York, New York
February 27, 2015

Respectfully Submitted,

OGLETREE, DEAKINS, NASH, SMOAK
& STEWART, P.C.

/s Frank Birchfield
Frank Birchfield
1745 Broadway
22nd Floor
New York, NY 10019
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of the aforesaid Response to Counsel for the General Counsel's Motion for Leave to Amend Complaint were served on February 27, 2015, in the manner set forth below:

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Gladstein, Reif & Meginness, LLP
817 Broadway, 6th Floor
New York, NY 10003

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/s Frank Birchfield
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EXHIBIT A

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KATHERINE H. HANSEN *
PATRICK J. WALSH
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* ALSO ADMITTED IN NJ

January 22, 2015

BY FACSIMILE AND REGULAR MAIL

Administrator
Woodcrest Health Care Center
800 River Road
New Milford, NJ 07646

Re: 1199 SEIU bargaining, access and information requests

Dear Sir or Madam:

This firm represents 1199 SEIU United Healthcare Workers East ("1199 SEIU"). As you are aware, the employees at Woodcrest Health Care Center voted in favor of union representation by 1199 SEIU in an election conducted by the National Labor Relations Board ("NLRB") in March 2012. On November 26, 2014, the NLRB certified the Union as the exclusive collective bargaining representative of certain non-professional employees at Woodcrest.

The Union requests that Woodcrest meet to bargain over the terms and conditions of employment for the bargaining unit employees. In order to prepare for bargaining the Union requests that Woodcrest grant access to work areas of the facility where bargaining unit employees work in order to observe work processes and working conditions, including health and safety conditions.

The Union also requests that Woodcrest provide the following information by January 28, 2015:

1. The names, job title, date of hire, regular hours of work, hourly rate of pay and home address for all employees in the collective bargaining unit certified by the NLRB.

2. Documents showing any and all wage increases and/or bonuses paid to each bargaining unit employee since January 1, 2010 to the present.
3. Copies of daily work schedules for all nursing units showing the work schedule of bargaining unit employees on each unit for all shifts for the period November 1, 2012 to the present.
4. Manuals, employment handbooks and any other documents describing terms and conditions of employment for employees in the bargaining unit, including but not limited to, any such documents distributed to employees at any time between January 1, 2011 to the present.

Finally, the Union requests that Woodcrest provide the Union with notice and an opportunity to bargain prior to making any changes to any terms and conditions of employment for any bargaining unit employee, including but not limited to the layoff of any employee, the suspension and/or discharge of any employee, any reduction in hours or change in health insurance benefits, paid time off benefits or wages.

Please contact me at 212-228-7727 by no later than January 28, 2015 to arrange a time to commence negotiations and for the Union to visit the facility. We will make ourselves available for negotiations based on your availability. Thank you for your cooperation.

Very truly yours,

A handwritten signature in black ink, appearing to read 'K. Hansen', enclosed within a large, loopy oval shape.

Katherine H. Hansen

EXHIBIT B

Ogletree Deakins

OGLETREE, DEAKINS, NASH,
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February 2, 2015

VIA FACSIMILE AND U.S. MAIL

(212) 228-7654

Katherine H. Hansen
Gladstein, Reif & Meginniss
817 Broadway, 6th Floor
New York, NY 10003

Re: 800 River Road Operating Co. LLC dba Woodcrest Health Care Center

Dear Ms. Hansen:

This firm represents 800 River Road Operating Company LLC, which operates Woodcrest Health Care Center ("Woodcrest"). Woodcrest requested that I respond to your letter of January 22, 2015 to Woodcrest's Administrator, in which SEIU 1199 requested bargaining over the terms and conditions of employment in the unit of Woodcrest employees for which the National Labor Relations Board certified SEIU 1199 as the bargaining agent. Your letter also made certain information requests purportedly relating to bargaining, as well as seeking physical access for union representatives to the workplace.

As you are aware, Woodcrest contested the certification of SEIU 1199 at the Woodcrest facility through litigation before the Board and the United States Court of Appeals for District of Columbia Circuit. Based on the most recent status of those proceedings and on the docket listing for NLRB Case Nos. 22-CA-097938 and 22-RC-073078, our understanding is that Woodcrest's challenge to the validity of the certification remains pending before the Board. Woodcrest has not received any documents or information indicating that these cases have been adjudicated in a manner that requires Woodcrest to commence bargaining with SEIU 1199. If you have contrary information, please forward it so that Woodcrest can consider it.

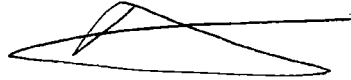
In the meantime, Woodcrest's position regarding the certification remains unchanged. Woodcrest declines to engage in bargaining or to provide the requested information. Physical access to Woodcrest's facility remains restricted to employees and visitors with legitimate business there.

Katherine H. Hansen
February 2, 2015
Page 2

Ogletree
Deakins

Please contact me with any questions or other communications regarding this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Frank Birchfield". The signature is stylized with a large, sweeping loop that extends to the right and then curves back down to the left, crossing over itself.

Frank Birchfield

FB:bjr

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